IN THE SUPREME COURT OF THE UNITED KINGDOM

INTERVENTION BY

THE COUNCIL OF THE LAW SOCIETY OF SCOTLAND AND THE FACULTY OF ADVOCATES

In the appeals by

DAVID DALY and **ANDREW DAVID KEIR**

Against

HIS MAJESTY'S ADVOCATE

WRITTEN CASE

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1. Introduction

1.1. This intervention is presented jointly by the Law Society of Scotland, the regulatory and representative body for solicitors (including those with extended rights of audience in the higher courts) practising in Scotland, and the Faculty of Advocates, the regulatory and representative body for Advocates practising in Scotland. Their members appear in the criminal courts on a daily basis, whether for the Crown, for the defence, or when providing independent support to complainers and others affected by crime. As is constitutionally important, they both act, in general and in the particular circumstances of these appeals, entirely independently of either the Crown or accused persons such as the appellants.

1.2. Beyond their regulatory functions, the interveners have significant involvement in law reform. They respond to consultations issued by the UK and Scottish Governments and parliamentarians. They are regularly called upon to give evidence to the UK and Scottish Parliaments. Both have played an important role in the progress of the Victims, Witnesses and Justice Reform (Scotland) Bill, which is currently before the Scottish Parliament. That Bill proposes, *inter alia*, major changes to the Scottish criminal justice system, including changes to jury verdicts and the creation of a specialist Sexual Offences Court.

1.3. The interveners present this intervention because of a desire on the part of both limbs of the profession to ensure that the proper administration of justice is done and seen to be done. It is

essential that a fair system of criminal justice strikes the right balance, so that both parties are afforded the necessary procedural safeguards to ensure that a jury hears all the relevant evidence it requires to come to its decision, whilst at the same time ensuring that the complainer is protected from the leading of questions that raise unrelated character issues or prior sexual history not relevant to the alleged criminality. It is a matter which must, in the interests of justice, work fairly for both parties.

1.4. The interveners accept and support the basic proposition that a version of the statutory scheme in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 is appropriate and necessary. It is vital that complainers are able to give evidence free from intrusive or inappropriate questions which are not relevant to the issues relevant to the jury's consideration, and are not put off from reporting crimes because of a fear that they will be subject to humiliation before a jury. In a similar vein, the interveners have supported several proposals in the Victims, Witnesses and Justice Reform (Scotland) Bill including to establish a Victims' Commissioner, provide independent legal representation for complainers, and introduce trauma-informed measures in the court process. Measures that improve the experiences of those involved in the criminal justice system are to be encouraged, as long as they do not undermine the fairness of the process. This appeal must thus focus on where the line is drawn with a view to protecting complainers from disproportionate cross-examination without preventing an accused being able properly to advance their version of events.

1.5. As is set out in more detail below, it is the position of the interveners that the protections afforded by sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (the 'statutory protections') have come to be misapplied, or indeed not applied at all, for the following reasons:

a. The High Court of Justiciary has narrowed the statutory concept of consent, regarding it as something that can only be determined in the instant, rather than recognising that it can be a more complicated and nuanced issue, particularly where the rape or other sexual assault is said to have occurred in the context of an ongoing relationship.

b. As a result of that narrowing, the High Court has wrongly determined that reasonable belief of consent can only arise in very limited circumstances (ie where there is a factual basis to assert that the complainer's actual lack of consent may have appeared, in the instant, as something different). In turn, that has meant that the High Court has taken a much too restrictive approach to identifying the facts in issue in trials involving allegations of rape or sexual assault, in particular by excluding relevant evidence as 'collateral'.

c. Because the test of relevancy is whether the evidence is capable of casting light on whether a fact in issue is more or less likely, the narrowing of the facts in issue by an expanding notion of what is collateral necessarily means a limitation on the evidence that would otherwise be considered relevant. Collateral matters are those which run parallel to a fact in issue and risk the jury becoming distracted or confused. In deciding whether to exclude such matters the court will have regard to the relevancy of the matter to the facts in issue, and the extent to which the matter can be immediately verified. The narrowing of the facts in issue reduces the prospect of such matters being considered sufficiently relevant to be admissible.

d. The approach of the courts has been to infringe on an area into which Parliament has chosen to legislate.

e. The overall effect of the foregoing creates a risk of the accused being denied a proper opportunity to present his defence at trial, with the consequence that the procedure is so unfair as to be incompatible with Article 6 ECHR.

2. Article 6 considerations

2.1. The overarching conclusion that the interveners invite this court to reach in these appeals is that the interpretation by the Scottish courts of the statutory definition of rape – and therefore the scope of relevant evidence for a rape trial – has gone so wrong that it has upset the balance of fairness between a complainer and an accused. The interveners respectfully invite this court to determine that the balance has become so skewed as to involve a real risk of breach of Article 6.

2.2. Article 6 does not prescribe the manner in which evidence should be assessed or determined to be admissible. The concern of Article 6 – as with all other Convention Rights – is at a higher level: have the proceedings been conducted fairly?

2.3. Article 6 does not govern admissibility of evidence, leaving that to domestic courts as long as the end result is fair: *Gäfgen v Germany* (case 22978/05 at [162]-[163]). Moreover, as has rightly been accepted, *'in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours'*: *AS v Finland* (case 40156/07 at [55]).

2.4. Similarly, in more general terms, the court has noted as follows in relation to the proportionality of any restrictions that are put in place in *van Mechelen v the Netherlands* (1998) 25 EHRR 647:

> '*58. Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied*.'

2.5. For the reasons set out below, the balance of fairness has not, as things stand, been struck in the right place.

3. The current approach of the Scottish courts

3.1. It is informative to begin by exploring the current position of the law in Scotland in order to demonstrate the difficulties that that position creates. In what follows, focus is on the crime of rape as defined by section 1 of the Sexual Offences (Scotland) Act 2009: but similar observations apply to other offences under that Act (e.g. under sections 2 or 3 thereof).

Consent and reasonable belief

3.2. For the reasons explored in more detail below, the interveners respectfully submit that the starting point is a recent narrowing of what might be considered relevant in charges of rape, leading to a situation where a wholly relevant line of evidence is regularly deemed not to be relevant. That removes from an accused the ability properly to present his defence to the jury and is a material unfairness.

3.3. Rape is now a statutory offence in Scotland. Per section 1 of the Sexual Offences (Scotland) Act 2009:

> *'1 Rape*
>
> *(1)If a person ("A"), with A's penis—*
>
> *(a)without another person ("B") consenting, and*
>
> *(b)without any reasonable belief that B consents,*

penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape...'

3.4. Section 1 abolished and replaced the prior common law crime of rape, as section 52 of the 2009 Act makes clear. Section 1 has its roots in a report by the Scottish Law Commission, *'Report on Rape and Other Sexual Offences*', published in 2007, which included the following:

> ***'Giving consent is not simply a matter of making a particular verbal utterance. It is rather something which emerges from what the parties do and say to each other****. The result is that the focus of attention is moved away from the victim, and towards what both parties did to bring about consent. In particular, it allows the law to adopt the position that if one person wants to have sex with another, and there is any doubt that the other person is consenting, then the obvious step to take is to ask.'*

3.5. The approach, which mirrored that in England and Wales (in the Sexual Offences Act 2003), was adopted by Parliament. Section 12 of what became the 2009 Act defines consent as 'free agreement', while section 13 identifies certain circumstances where conduct took place without free agreement. Section 16 deals separately with the issue of reasonable belief, and requires that 'regard is to be had to whether the person took any steps to ascertain whether there was consent …; and if so, to what those steps were'.

3.6. The Commission's approach to consent was founded, properly, in the principle of respect for sexual autonomy. It recognised that determining whether consent had been given in respect of an activity could be difficult, and the manner of doing so would vary according to circumstances:

> *'In some situations sexual conduct proceeds on the basis of the consent of the parties without there being discussion or negotiation about consent, for example where parties have a long-standing relationship and regularly engage in a particular type of sexual activity'* (Report, §2.7).

3.7. Section 1 defines rape in terms of the absence of (i) consent *and* (ii) the accused having a reasonable belief in consent. Consent is to be determined subjectively (did the complainer consent), whilst reasonable belief has an element of subjectivity (the existence of the belief on the part of the accused) and an element of objectivity (whether that belief was reasonable). The use of the conjunctive 'and' means that both lack of consent and absence of reasonable belief are

matters for proof by the Crown, and both must be proven to the criminal standard in order for the crime of rape to be made out.

3.8. Statutorily, it is necessary for an accused person who seeks to lead evidence of consent, or reasonable belief thereof, to plead same in advance of the preliminary hearing: 1995 Act, section 78(2), read in light of sections 78(2A) and 288C thereof. However, the procedural requirements contained in the 1995 Act do not override the content of section 1 of the 2009 Act in defining the offence of rape, and in stipulating what requires to be proven beyond reasonable doubt by the Crown in order to warrant a conviction therefor. In a situation in which the complainer deponed that she had consented to the acts libelled, and where there was no evidence to the contrary, a conviction of rape could not follow, even if there was no notice lodged in terms of section 78(2). The '*absence of reasonable belief is an essential element of rape under section 1, which the Crown must prove in every case*': *Winton v HM Advocate* 2016 SLT 393 at [7]-[8].

3.9. In *LL v HM Advocate* 2018 JC 182, an accused person charged with rape pled consent and reasonable belief that it existed, and lodged a section 275 application seeking to introduce evidence that he and the complainer had been friends and had, some months prior, engaged in consensual sexual intercourse. The application was refused. Similarly, in *SJ v HM Advocate* 2020 SCCR 227, an accused person charged with raping the complainer on the evening of 11-12 January 2018 pled consent, and lodged a section 275 application seeking to adduce evidence of them having kissed and cuddled on the previous Hogmanay, along with a subsequent exchange of text messages. The application was refused, as was an appeal against that decision. In the opinion of Lord Turnbull (a view that represented the majority of the court):

> '*In my opinion, there can be no freestanding purpose, or relevance, in establishing that the friendship between the complainer and the appellant had included prior amorous or consensual sexual behaviour of a limited kind. Such evidence can only pass the test of relevance if it bears in some meaningful way on the issue at trial*.'

3.10. It is respectfully contended that this discloses an error – which has now become embedded in the Scottish treatment of applications under section 275 of the 1995 Act – in determining that consideration of both consent and reasonable belief is necessarily limited to events immediately proximate to the intercourse that took place. It is readily apparent that the length and nature of the relationship between the complainer and the accused may be centrally relevant to the matter of consent, and the question of whether the accused's belief as to consent was, in the particular circumstances of the case, one that was reasonable. Not only is reasonable belief a relevant

matter, it is an essential element of the crime for the Crown to prove an absence thereof. Indeed, absent that element, where is the *mens rea* of the crime; if the crime is to be determined only by the subjective consent or lack thereof on the part of the complainer, how are the courts and juries to determine the guilty mind of the accused?

3.11. It is accepted that the necessary proof of absence of reasonable belief will be inferential, and drawn from proven facts: *Graham v HM Advocate* 2017 SCL 963 at [23]. As such, it does not require independent corroboration: but the jury must still be directed thereon (*Maqsood v HM Advocate* 2019 JC 45 at [17]).

3.12. The difficulty is, however, that notwithstanding the fact that absence of reasonable belief in consent remains something which the Crown must prove, the fact that proof thereof is inferential has tended to lead to the conclusion that, where an accused's position is that there was actual consent, reasonable belief therein is no longer a 'live issue', such that any reference to evidence which would tend to speak to reasonable belief is to be regarded as collateral. This is exemplified by *Maqsood* itself, in which the Court said (at [17]):

> *'That issue (absence of reasonable belief) will be live only in a limited number of situations in which, on the evidence, although the jury might find that the complainer did not consent, the circumstances were such that a reasonable person could nevertheless think that she was consenting. That does not normally arise, for example, where an accused describes a situation in which the complainer is clearly consenting and there is no room for a misunderstanding.'*

3.13. That analysis involves a *non sequitur.* It is entirely possible for there to be a situation in which the accused describes a situation in which – by his perception – the complainer was clearly consenting and yet where, for example as a result of intoxication not known to the accused, the necessary consent was absent. Absence of reasonable belief, as a necessary ingredient for the crime of rape and one which must be proved (albeit inferentially) by the Crown beyond reasonable doubt, is always a 'live issue'.

3.14. Notwithstanding the 2009 Act's specific inclusion of lack of consent and lack of reasonable belief therein as essential elements of the crime, and therefore as matters for proof by the Crown, section 78 as discussed above requires an accused person to raise consent and/or reasonable belief as if it were a special defence (requiring intimation in advance of the preliminary hearing). This has led to the Court holding that in many cases absence of reasonable belief can practically

be ignored, as not a 'live issue'. As a recent example, in *Thomson v HM Advocate* [2024] HCJAC 30, one finds the following:

a. At a preliminary hearing, defence counsel '*under some prompting from the preliminary hearing judge'* removed references of reasonable belief from the notice of special defence (§5);

b. The Advocate Depute, in his speech to the jury, stated that the question of either honest or reasonable belief did not arise as there was no evidence to put that in issue (§24);

c. Defence counsel referred to reasonable belief in his speech to the jury and the trial judge intervened, noting that reasonable belief had been removed from the notice of special defence (§25); and

d. The jury were directed that rape, at common law was committed by the deliberate penetration of the woman without her consent. They were told that under section 1 of the 2009 Act, it consisted of the intentional penetration of the complainer '*without the complainer's consent and without any reasonable belief on the part of the accused that the complainer consented. In this case… no issue of reasonable belief arises for consideration'* (§26).

3.15. Against that background, having already rejected the appeal on the basis of the decision in *Graham* discussed above, the Appeal Court determined as follows:

'*There is a second, procedural, basis upon which this ground would be bound to fail. The issue of honest or reasonable belief was raised at the Preliminary Hearing in the context of the contents of the then special defences of consent. Reasonable belief was removed from the defences. The only special defences which remained were of consent.* ***Belief was out of the equation*** *unless and until the court permitted it to be re-introduced for whatever reason. If the appellant wished to found on it in his speech, he ought to have raised the issue before the Advocate Depute's speech and sought permission to amend the special defences by including reference to it. A special defence is designed to give the Crown notice of the nature of the defence. The Crown are entitled to rely on what the special defence says, or does not say, in presenting their case to the jury. In the absence of an averment of belief, the Crown are entitled to approach the case, including their address to the jury, on that basis. They cannot be expected to anticipate that honest or reasonable belief will emerge after they have concluded their*

address and are functus officio. It was not appropriate for defence counsel to introduce the concept, without notice, into the defence speech. It was not appropriate to introduce a defence for which there was no evidential base. If a complainer says she did not consent and the accused say she did, it is not for defence counsel to invent a middle, speculative ground.'

3.16. It is clear from that very recent decision that the interpretation of the statutory definition of rape has become so confused that essential elements from the definition are being mistaken on a regular basis for matters for which the defence carries the burden of proof. Far from being a '*middle, speculative ground'*, an absence of reasonable belief is a matter which is an essential element of the crime, and therefore *requires* to be spoken to and proved by the Crown. The final sentence of the passage quoted discloses the problem: if a complainer says she did not consent and the accused says she did, the possibility of reasonable belief of consent is not a '*middle, speculative ground*'. Rather, it is a logical development of a process of inferential reasoning in which the jury holds that the necessary consent was absent, but is persuaded (or at least has a reasonable doubt) that the accused's description of his understanding that consent existed meant that the necessary absence of reasonable belief was not made out.

3.17. The position in such cases can be contrasted with the position in England and Wales where, despite the definition of rape in section 1 of the Sexual Offences Act 2003 being in almost identical terms, it is clearly understood to be a requirement on the Crown to prove the absence of reasonable belief. Reference is made to the discussion of the Court of Appeal in *R v Ivor* [2021] EWCA Crim 923, particularly at §37:

'*We are satisfied that the judge was right to leave the question of consent, including reasonable belief, to the jury. The evidence which went to the question of reasonable belief was made up of a mosaic of individual pieces from a wide range of witnesses. It required the jury to evaluate those pieces of evidence in the context of a broad picture to determine whether the prosecution had proved the absence of reasonable belief.*'

3.18. It is accepted that it would be competent (though rarely warranted) for the trial judge, after the evidence has been led, to withdraw the question of reasonable belief from the jury. If the evidence does not begin to disclose any question of such belief, then the trial judge may so hold. However, the difficulty is that decisions in that regard are made at preliminary hearings, long before any evidence is led. Where an accused's position is that the complainer consented, as a matter of logic it will almost always be a possibility that his position in that regard will raise the possibility that – even if she did not – he reasonably believed otherwise. Directing the jury that

this is not a live issue, as has been seen in recent cases, is unwise and productive of unfairness save in the most clear-cut of cases.

3.19. The result of decisions such as those discussed above is that the High Court of Justiciary has increasingly moved to the point that only events immediately proximate to intercourse are relevant for the purposes of demonstrating consent, and in assessing whether any belief by the accused in consent is reasonable. That has led to reasonable belief being marginalised in most cases, requiring only consideration of the precise moment of the penetrative act in question to the exclusion of all other context as to how the parties came to be in those circumstances. It has created a situation in which, on a regular basis, juries are invited to consider an isolated sexual act, shorn of context, and denied knowledge of what happened before and after. Such juries are, in effect, 'beamed in' to a recitation of the event itself, and immediately 'beamed out' again. This is perhaps exemplified by the case of *HM Advocate v JW* 2020 SCCR 174, in which Lord Turnbull said (at [19]-[21]):

> *'In the case of* GW v HM Advocate *the court made it plain that the definition of the offence of rape ... requires that consent is to be given, in whatever form, at the time of the sexual act and not at a point remote from it. Thus, the court made it clear that, as a matter of law, consent to a sexual act could not be given in advance… If, as a matter of law, a prior expression of willingness to engage in sexual activity simply cannot constitute consent to a subsequent act of that kind, then it cannot provide the basis for a "reasonable" belief in consent either.'*

3.20. This has a consequential effect (seen in *JW* itself) in relation to how the courts approach applications under section 275 of the 1995 Act, and the prior check on relevancy in particular as developed below.

3.21. If only events immediately proximate to intercourse are capable of informing the court's decision on whether consent or belief were present, then other evidence (such as whether the accused and complainer engaged in consensual intercourse shortly before or shortly after the incident complained of) is likely to be seen as – and, in practical terms, is determined to be – irrelevant. As noted above, that assessment is made not in the full context of the unfolding trial, but many months earlier by the preliminary hearing judge.

The statutory protections

3.22. The need for provisions akin to the statutory protections in sexual offences cases has long been recognised. In Scotland, the current provisions (which have their roots in section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985) are found in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. These provisions were most recently amended in 2002. Section 274 specifies categories of evidence which are not to be admitted in sexual offence cases; section 275 provides a mechanism by which the court can be asked to admit such evidence.

3.23. The statutory scheme was the subject of consideration by the Judicial Committee of the Privy Council in *HM Advocate v DS* 2007 SCCR 222. In *DS*, the court determined that the scheme was fair. That decision was shared by the European Court of Human Rights in *Judge v United Kingdom* 2011 SCCR 241. It noted that the amended scheme in 2002 was the '*result of careful deliberation by the Scottish Parliament*'.

3.24. The statutory scheme itself operates by restricting the admissibility of evidence in relation to a person charged with an offence to which section 288C of the 1995 Act applies (ie those charged with a sexual offence). In particular, section 274 operates so as to prevent any question which is designed to elicit evidence which shows or tends to show that the complainer (a) is not of good character (whether in relation to sexual matters or otherwise); (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge; (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer (i) is likely to have consented to those acts, or (ii) is not a credible or reliable witness; or (d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

3.25. It may be presumed that section 274 was enacted on the basis of an understanding of the common law of evidence as it stood before the Act. The section thus must be read as accepting that, at least as a matter of generality, the topics addressed in section 274 are relevant at common law: otherwise, there would be no need for the statutory restriction.

3.26. That restriction is subject to section 275 which permits an application to be made to the court to admit any such evidence or to allow such questioning. In order to allow an application under section 275, the court must be satisfied that (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating (i) the complainer's character; or (ii) any condition or predisposition to which the complainer is or has been subject; (b) that occurrence or those occurrences of behaviour or facts are relevant

to establishing whether the accused is guilty of the offence with which he is charged; and (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

3.27. In broad terms, the purpose of the scheme is to exclude bad character and sexual behaviour evidence except where the court determines, after careful consideration, that such evidence ought to be admitted. As explained by Lord Rodger of Earlsferry in *DS* at §74:

> '… *the aim of section 274 is to restrict unnecessarily intrusive or distressing evidence or questioning relating to sexual or other behaviour which would not serve any legitimate forensic purpose. Its terms should be interpreted with this general aim in mind*.'

3.28. In the same case, Lord Hope said (emphasis added):

> *'27. The sections seek to balance the competing interests of the complainer, who seeks protection from the court against unduly intrusive and humiliating questioning, and the accused's right to a fair trial. They lean towards the protection of the complainer. The protection is very wide. It extends to questions and evidence about the complainer's sexual behaviour at any time other than that which forms part of the subject-matter of the charge. It extends also to behaviour which is not sexual behaviour at any time other than shortly before, at the same time or shortly after, the acts which form part of its subject-matter which might found the inference that the complainer consented to those acts or is not a credible or reliable witness. But the court is permitted, in the accused's interest, to admit such evidence or allow such questioning if it is satisfied that it passes the three tests which are set out in section 275(1).*
>
> *28. The important point to notice is that such questioning or the admission of such evidence will only be permitted if the court has been persuaded that it passes those three tests. The purpose of section 275 is to ensure that the accused will receive a fair trial, notwithstanding the restrictions that are imposed by section 274. The three tests are designed to achieve that purpose consistently with the proper administration of justice which, as section 275(2)(b) makes clear, includes the appropriate protection of the complainer's dignity and privacy.* ***A court which is satisfied that all three tests are met will have concluded that the questioning or evidence relates only to specific matters which are relevant to establishing whether the accused is guilty and are of significant probative value. To deny the appellant the opportunity***

***of questioning or the admission of evidence which passes all three tests risks denying the accused a fair trial**.'*

3.29. On the matter of the Article 6 compatibility of the statutory scheme, the Lord Justice Clerk in *M(M) v HM Advocate* 2004 SCCR 658 noted as follows (referred to in *Judge* with approval):

> '*If section 274 had imposed an absolute prohibition on the questioning or evidence to which it refers, there would have been a violation of article 6… But in sections 274 and 275 there are safeguards for the accused. The legislation recognises that there may be circumstances in which such questioning or evidence is necessary for the proper conduct of the defence. Instead of prohibiting such questioning or evidence, it places the question of its admissibility under judicial control**, recognising that the relevance of evidence on matters mentioned in section 274(1) will vary according to the circumstances of the case**. Section 275 reserves to the discretion of the judge the allowance of such cross-examination and evidence where the circumstances of the case require it in the interests of a fair trial. The exercise of that discretion will depend, in general, on the apparent relevance of the proposed line of cross-examination or evidence, the disadvantage, if any, to which the accused will be put if it is not allowed, and the overall consideration of the interests of justice… Section 275 , in my view, is a reasonable and flexible response to the problem and a legitimate means of achieving the legislative objective…'*

3.30. The central reason that the statutory scheme was found to be compatible with Article 6 was that it '*does not place an absolute prohibition on the admission of such evidence but allows for its admission when that history or character is relevant and probative'* (*Judge* at §29).

3.31. In recent years, the courts have (i) insisted that before an application under section 275 can be considered, the court must first be satisfied that the proposed evidence is admissible at common law, and (ii) repeatedly tightened the understanding of what is relevant in sexual offence cases. That has been coupled with the narrowing of the concepts of reasonable belief as it applies in rape cases, well beyond Parliament's original intention.

3.32. The effect of the recent Scottish jurisprudence has been to narrow significantly the circumstances in which evidence will be considered *prima facie* admissible, and in turn to remove from judges exactly the overriding discretion that allowed the statutory scheme to be determined to be compatible with Article 6 – the power to admit evidence where it would be contrary to the interests of justice to exclude it. It is in the determination of where that balance lies that the

question of Article 6 compliance now arises precisely because of the manner in which the intention of Parliament in relation to the statutory scheme may be – and the interveners say *is* – being circumvented.

3.33. The interveners summarise the key recent decisions below to demonstrate the direction of travel that has been adopted by the Scottish courts.

The prior check on relevancy

3.34. Per the Lord Justice Clerk in *CH v HM Advocate* 2021 JC 45 (at §§34 and 36, referring to *CJM v HM Advocate* 2013 SLT 380):

> '*The touchstone for consideration of an application under sec 275 of the 1995 Act is that the evidence sought to be elicited is admissible at common law… The decision in* M *may be summarised thus: (i) evidence is only admissible if it is relevant; (ii) evidence is relevant if it makes a fact in issue more or less probable: the testimony must have a reasonably direct bearing on the subject-matter of the prosecution; this would exclude collateral evidence; (iii) if evidence is inadmissible at common law it is inadmissible under the statute; (iv) the very nature of the statutory provisions is to restrict the admissibility of evidence permissible at common law, not to expand it…*'

3.35. In *CH*, the court determined that evidence of consensual sexual intercourse between the complainer and the accused hours prior to the alleged rape, and again the following morning, was irrelevant and hence inadmissible at common law. That meant that the statutory provisions were not engaged. That decision was consistent with other recent decisions of the courts, including *HM Advocate v JW* 2020 SCCR 174 (consensual sexual activity hours after alleged rape deemed irrelevant) and *SJ v HM Advocate* 2020 SCCR 227 (consensual sexual activity ten days before and shortly after alleged rape deemed irrelevant).

3.36. It might fairly be said to be a remarkable aspect of *CH,* a Full Bench decision, that none of the members of the court addressed reasonable belief at all, other than Lord Glennie in his dissent. The majority found that evidence of consensual intercourse shortly before or after the alleged rape was collateral, effectively (though not expressly) overruling *Oliver v HM Advocate* 2020 JC 119.

3.37. Such decisions have given rise to concern amongst some members of the judiciary as well as among solicitors and counsel. In his dissenting opinion in *CH*, Lord Glennie noted (at §98):

> *'I have no difficulty with the proposition that evidence which is truly collateral in the sense of being removed from and bearing only indirectly on the real issues in the case can be excluded as collateral. I have no difficulty with the decision in* [CJ]M. *But there is a danger of taking this too far, and excluding potentially relevant evidence of events surrounding the incident forming the subject-matter of the libel, and thereby disembodying the case before the jury. Evidence which has a reasonable and direct bearing on the subject-matter of the libel should not be excluded as collateral simply because it is disputed. Except to the extent excluded by statute, the jury should have before it all the evidence directly relating to the events of the libel, and that includes all evidence showing how the complainer and the accused came to be in the situation in which the offence is said to have been committed and the events immediately following upon that alleged offence. It is arguable that such evidence forms part of the res gestae; but, whether or not that is formally correct, it is evidence which at least places the alleged incident in its proper context, and should not be excluded as collateral. Were it not so, it would give licence to the Crown to set the agenda for the trial and to narrow the libel so as to exclude the possibility of the accused giving his account of what he says really happened.'*

3.38. In his dissenting opinion in *CJM*, Lord Clarke said (at §51): '*...I cannot accept that the test of relevancy falls to be determined simply by the nature of the evidence available to establish the falsity of the allegations. It seems to me that the means of establishing the previous allegations, and their falsity, cannot and should not be made subject to such a prescriptive regime.'*

3.39. It is respectfully submitted that there is force in these observations. Picking up on Lord Glennie's observations, and bearing in mind that evidence is generally relevant if it impacts on the likelihood of a particular version of events, it is less likely that someone who has been raped would have consensual intercourse shortly thereafter; and it is less likely that someone who has previously has consensual intercourse with the complainer would have an absence of reasonable belief in consent. In neither instance is the extraneous conduct in any way determinative; but equally in neither can it be said to be irrelevant.

3.40. Per Lord Malcolm in *SJ v HM Advocate* 2020 SCCR 227 (at §25):

> *'...To my mind the signposts are provided in s.275(1) of the Act, and in particular the requirement in subs.(c) that "the probative value of the evidence sought to be admitted or*

elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited", keeping in mind that the proper administration of justice includes "appropriate protection of a complainer's dignity and privacy" (s.275(2)(b)(i)). I have concerns about an approach which would render this test largely redundant, with all or at least most applications being refused on the basis of the second of the three cumulative tests in s.275(1), namely that of relevancy under subs.(1)(b). This would aid certainty, but the background to the reforms discussed earlier, and the structure of the provision suggests that the parliamentary intention was to provide guiding principles as to the court's task, not to remove the scope for judicial discretion. It is that evaluation based upon the particular circumstances of a case, described as a proportionality exercise in R. v A (No.2), *which provides the safeguard against miscarriages of justice and breaches of art.6.'*

3.41. The court has made it clear to practitioners that section 275 applications should not be presented unless the proposed evidence can be shown to meet the increasingly exacting prior check on common law relevance. Practitioners are aware that applying to admit evidence that the court is likely to consider irrelevant or collateral will result in criticism from the bench. Such an approach renders the statutory scheme largely redundant. Per Lord Glennie in *CH* (at §92):

'The policy objectives underpinning the relevant legislation are well known. It should not, therefore, be regarded as surprising that as a result of the introduction of secs 274 and 275 a considerable body of evidence which would otherwise have been admitted at common law as both relevant and not collateral is now excluded. There would have been no need for the legislative changes were it otherwise. Yet the approach now adopted appears to proceed upon the assumption that all or almost all such evidence is now to be excluded on the basis that it is irrelevant or collateral. This approach, if correct, raises the question why there was any need for the legislature to intervene in the first place…'

4. Relevancy as a matter of Scots law and its application to rape trials

4.1. It will be clear from the exposition of the decisions above that the particular issue in this regard is not with the statutory scheme *per se*. As set out above, the statutory scheme is balanced and allows a discretion to be exercised by the courts in order to ensure a fair trial. It is the narrowing of the concept of reasonable belief in combination with the notion of collaterality that has caused the imbalance which the interveners seek to highlight.

4.2. At a first principles level, Scots law regards an issue to be collateral (and evidence on it therefore to be inadmissible) where it is an issue that:

> '*… runs parallel to a fact in issue but evidence of it is generally inadmissible on grounds of relevance, because the existence of the collateral fact does not have a reasonably direct bearing upon a fact in issue and thus does not render more or less probable the existence of that fact, and it is inexpedient to allow an enquiry to be confused and protracted by enquires into other matters*.'[1]

4.3. The issue in many rape cases is not whether intercourse took place, but whether the complainer consented to intercourse, and whether the accused reasonably believed that the complainer consented. The definition of rape – now enshrined in legislation – is, accordingly, the touchstone for relevancy.

4.4. Where, in the respectful submission of the interveners, the Scottish courts have taken a wrong turn is by (i) restricting consideration of the issue of consent to time only proximate to the penetrative act, and (ii) sidelining reasonable belief as an issue. The effect of that is artificially to narrow what it is that is required to be proved in a rape trial, and therefore what may be said properly to be relevant evidence. The result is that there is an overly narrow focus on the complainer's words immediately prior to intercourse (relevant to section 1(1)(a) of the 2009 Act) whilst rendering nugatory reasonable belief which is equally relevant to the crime as a result of section 1(1)(b). The consequence of that is that the Scottish courts have led themselves into error as regards what is relevant evidence during a rape trial to the material detriment of the fairness of the proceedings.

4.5. The effect of the decisions of the Scottish courts as sought to be summarised above is to determine that the context in which the allegations took place – which speaks directly to one arm of the statutory definition of rape and therefore must be relevant – is not something that an accused is entitled to place before a jury. That is to remove – the interveners say unlawfully – one of the statutory requirements within the definition of rape.

4.6. That restricts profoundly – well beyond the extent that may have been intended by Parliament – the issues for trial. Judicial discretion provided an important procedural safeguard in the statutory scheme as originally understood. Its effective removal calls into question the extent to which the

[1] Walker and Walker, The Law of Evidence in Scotland (5th ed), §7.1

overall scheme (ie the statutory scheme when taken alongside the restrictions in relation to relevancy) is now compatible with Article 6.

4.7. As set out above, in recent years the court has repeatedly narrowed its approach to consent and reasonable belief. That means that evidence which would previously have been considered relevant, or which may be considered relevant in other jurisdictions, is no longer capable of being admitted into Scottish proceedings. The overall consequence of that approach is erroneously to render irrelevant something which, by any reckoning, is entirely and directly relevant to the statutory definition of the crime.

4.8. The recent decisions of the Appeal Court hamstring an accused at trial by denying any opportunity to set the facts as outlined in the libel into context. Evidence that a complainer freely consented to sexual intercourse shortly before an incident which is said to have been a rape is highly relevant both to the question of consent and to the question of reasonable belief in consent. Evidence that a complainer freely consented to sexual intercourse shortly after an incident which is said to have been a rape is equally relevant to whether she consented to the incident in the libel. If such evidence is to be excluded, it should be excluded under reference to the statutory protections under sections 274 and 275, not by reference to a wider understanding of what might, at common law, be collateral.

4.9. There are also concerns about the extent to which similar principles are not applied consistently to the Crown and the defence.

4.10. For example, following the Appeal Court's decision in *Lord Advocate's Reference (1 of 2023)* 2024 JC 140, it is now possible for the distress of the complainer after the event to corroborate an accusation of rape, including corroboration of a lack of consent. The practical effect of that is (i) to permit a jury to consider the distress of a complainer weeks or months *after* the alleged incident and to determine that to be evidence in support of a lack of consent but, by the same token, (ii) to refuse to permit an accused to lead evidence of the circumstances leading up to or subsequent to the alleged incident to demonstrate that the complainer did, in fact, consent and/or he had a reasonable belief that the complainer was consenting. Subsequent consensual intercourse (apparently collateral) might fairly be said to be the antonym of distress (now corroborative).

4.11. It is the position of the interveners that fairness must be the utmost concern in all court proceedings, particularly proceedings in the criminal courts. That fairness must balance the

interests of the complainer and the interests of the accused. It is beyond question that a complainer should not be humiliated or asked entirely irrelevant questions in court. Fairness, however, demands that an accused person has the ability to contextualise the circumstances of the allegations.

4.12. Measures designed to address the concerns of complainers cannot come at the price of systemic unfairness to those accused of sexual offences. That is *a fortiori* the case in a criminal justice system that permits conviction by a simple majority of the jury.

4.13. The question of what should and should not be permitted should properly be a matter for the statutory scheme under sections 274 and 275 of the 1995 Act. Put another way, whether the evidence ought to be permitted should be a matter for the trial judge. The restrictions as to the relevancy or collaterality of evidence are currently overly-restrictive, treating sexual offences differently from any other matter that comes before the court.

5. Legislative Supremacy

5.1. The interveners are concerned that the recent restriction on the relevancy of particular evidence for the specific purpose of sexual offences trials has an ancillary constitutional issue in that it bears to be an undermining of a specifically-implemented statutory scheme by way of the common law. That would be a clear breach of the principle of legislative supremacy.

5.2. Where Parliament has seen fit to enact and implement a statutory scheme, the role of the common law is necessarily restricted in comparison to an area into which Parliament has not tread. It is for the courts to interpret and apply the legislation in accordance with its determined purpose.

5.3. Respectfully, where Parliament has spoken on the matter, it is not for the courts to innovate on that detailed scheme using an unduly restrictive approach to common law relevancy.

6. Conclusion

6.1. The interveners, for the reasons set out above, submit that the overly-restrictive interpretation of relevancy for the purposes of sexual offences has resulted in an undermining of the statutory scheme. The effect of that undermining is, in effect, to remove from an accused the ability properly to (i) test the case made against him, and (ii) place before the jury the full context in which the actions took place.

6.2. The overall effect, therefore, is to create a situation in which the procedure is potentially (and dependent on the precise facts of the case) unfair as to amount to a breach of the accused's Article 6 right to a fair trial. The State is under an obligation not only to protect the complainer (which is an important factor), but is also under an obligation to make sure those protections do not undermine the fairness of the proceedings in relation to the accused. The balance at the moment has not been struck fairly for the accused who is put at a distinct disadvantage in a trial when accused of a sexual offence.

6.3. The statutory scheme alone is sufficient to protect the complainer without undermining the rights of the accused. That is particularly so when the overall determination is left to the judgement of the trial judge whose duty it is to ensure a fair trial for all parties. The narrowing of the scope of relevant evidence in the manner set out above runs the risk of being a disproportionate interference with the Article 6 compatibility of the statutory scheme.

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